

REPORT OF THE JUDICIAL COUNCIL ADMINISTRATIVE PROCEDURE ADVISORY
COMMITTEE ON THE USE OF ELECTRONIC COMMUNICATIONS IN
ADMINISTRATIVE PROCEEDINGS

December 6, 2013

In December 2012, the Administrative Procedure Advisory Committee asked for and received permission from the Judicial Council to conduct a study of the use of electronic communications in administrative proceedings. The need for the study came to the Committee's attention in part because of the introduction of 2013 SB 122, which would have allowed electronic notice in proceedings under the Kansas Administrative Procedure Act.

2013 SB 122 was introduced at the request of the Department of Children and Families (DCF). Several individual members of the Administrative Procedure Advisory Committee were asked by DCF to provide input during the drafting of the bill, although neither the Committee nor the Council took an official position on it. SB 122 was gutted in conference committee and used for an unrelated bill.

In conducting its study, the Committee solicited input from state agencies on how they currently use electronic communications and any issues they are facing as a result. After reviewing agency responses and the provisions of the Kansas Administrative Procedure Act and Kansas Judicial Review Act, the Committee agreed to recommend the attached amendments, which are intended to encourage and facilitate electronic communication. Comments are included to more fully explain each proposed amendment. The Committee believes that expanding the use of electronic communications will improve the administrative process and save the state money.

The members of the Administrative Procedure Advisory Committee who participated in this study are:

Carol Foreman, Chair; Topeka

Athena Andaya; Topeka

Martha Coffman; Lawrence

Tracy T. Diel; Topeka

James G. Flaherty; Ottawa

Jack Graves; Wichita

Hon. Steve Leben; Fairway

Prof. Richard E. Levy; Lawrence

Steve Schwarm; Kansas City

Mark W. Stafford; Topeka

Michele L. Tunnell; Topeka

1
2
3 **77-531. Service of order or notice.** Service of an order or notice shall be made upon the party and the
4 party's attorney of record, if any, (1) by delivering a copy of the order or notice to the person to be
5 served; ~~(2)~~ or by mailing a copy of the order or notice to the person at the person's last known address;
6 or (3) if the person has consented to service by electronic means, by sending a copy of the order or
7 notice to the person by electronic means. Service shall be presumed if the presiding officer, or a person
8 directed to make service by the presiding officer, makes a written certificate of service. Delivery of a
9 copy of an order or notice means handing the order or notice to the person or leaving the order or
10 notice at the person's principal place of business or residence with a person of suitable age and
11 discretion who works or resides therein. Service by mail is complete upon mailing. Service by electronic
12 means is complete upon transmission or as otherwise specified in the consent. Whenever a party has
13 the right or is required to do some act or take some proceedings within a prescribed period after service
14 of a notice or order and the notice or order is served by mail or electronic means, three days shall be
15 added to the prescribed period.

16 COMMENT: The amendments to this section would authorize service by
17 electronic means as a third alternative method of service of an order or notice in
18 a proceeding under the Kansas Administrative Procedure Act, but only if the
19 person to be served has consented to service by electronic means. Except for the
20 amendment in line 15, the amendments are essentially the same as those
21 contained in 2013 SB 122.

22 The amendment in line 15 provides that the 3-day mailing rule applies to service
23 by electronic means as well as by mail. Although it may seem counterintuitive to
24 allow the extra 3 days' response time when service is by electronic means (since
25 electronic transmission is generally instantaneous), the Committee believes that
26 extending the 3-day mailing rule to electronic service is important for several
27 reasons. First, allowing 3 extra days of response time will encourage people to
28 consent to service by electronic means. Second, it will keep KAPA parallel to the
29 code of civil procedure, which includes a 3-day mailing rule for both service by
30 mail and by electronic means. Third, it will allow some extra time to cure any
31 problems that might arise with electronic transmission and will account for the
32 fact that electronic service can occur at any time, such as over a weekend when
33 the recipient is not checking email.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

77-502. Definitions. As used in this act:

(a) "State agency" means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches of state government and political subdivisions of the state, which is authorized by law to administer, enforce or interpret any law of this state.

(b) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the state agency is vested by any provision of law.

(c) "License" means a franchise, permit, certification, approval, registration, charter or similar form of authorization required by law for a person to engage in a profession or occupation.

(d) "Order" means a state agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interest of one or more specific persons.

(e) "Party to state agency proceedings," or "party" in context so indicating, means:

- (1) A person to whom an order is specifically directed; or
- (2) a person named as a party to a state agency proceeding or allowed to intervene as a party in the proceeding.

(f) "Person" means an individual, partnership, corporation, association, political subdivision or unit thereof or public or private organization or entity of any character, and includes another state agency.

(g) "Political subdivision" means political or taxing subdivisions of the state, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups or administrative units thereof, receiving or expending and supported in whole or in part by public funds.

(h) "In writing," "writing" or "written" means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

COMMENT: A definition of "in writing," "writing" or "written" has been added to clarify that the terms encompass electronic communication but not oral communication.

77-519. Pleadings, motions, objections, briefs; service. (a) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, objections and motions, including, but not limited to, motions to dismiss and motions for summary judgment.

1 (b) The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity
2 to file briefs, proposed findings of fact and conclusions of law and proposed initial or final orders.

3 (c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by
4 state agency rule and regulation or by the presiding officer, which may include electronic means.

5 COMMENT: The amendment authorizes parties in administrative proceedings to
6 serve any filed item by electronic means if the agency has a rule or regulation
7 allowing electronic service or if the presiding officer adopts an order allowing
8 electronic service. The amendment is a clarification and reflects current agency
9 practice.

10 Note that the amendment to this section differs slightly from the amendments to
11 K.S.A. 77-531. K.S.A. 77-531 is a narrower provision that governs service of
12 notices and orders. Because notices are the means of initiating an administrative
13 proceeding and orders are the end result of a proceeding, both of which can
14 trigger time limits for responding, those documents should be served
15 electronically only if the person being served has consented to that type of
16 service.

17

18 **77-521. Intervention.**

19 (a) The presiding officer shall grant a petition for intervention if:

20 (1) The petition is submitted in writing to the presiding officer, with copies ~~mailed to~~ served on all
21 parties named in the presiding officer's notice of the hearing, at least three business days before the
22 hearing;

23 (2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges,
24 immunities or other legal interests may be substantially affected by the proceeding or that the
25 petitioner qualifies as an intervener under any provision of law; and

26 (3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of
27 the proceedings will not be impaired by allowing the intervention.

28 (b) The presiding officer may grant a petition for intervention at any time upon determining that the
29 intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of
30 the proceedings.

- 1 (c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the
2 intervener's participation in the proceedings, either at the time that intervention is granted or at any
3 subsequent time. Conditions may include:
- 4 (1) Limiting the intervener's participation to designated issues in which the intervener has a particular
5 interest demonstrated by the petition;
- 6 (2) limiting the intervener's use of discovery, cross-examination and other procedures so as to
7 promote the orderly and prompt conduct of the proceedings; and
- 8 (3) requiring two or more interveners to combine their presentations of evidence and argument, cross-
9 examination, discovery and other participation in the proceedings.
- 10 (d) The presiding officer, at least one business day before the hearing, shall issue an order granting or
11 denying each pending petition for intervention, specifying any conditions and briefly stating the reasons
12 for the order. The presiding officer may modify the order at any time, stating the reasons for the
13 modification. The presiding officer shall promptly give notice of an order granting, denying or modifying
14 intervention to the petitioner for intervention and to all parties.

15 **COMMENT:** The amendments to this section and the remaining sections are
16 intended to clarify that electronic communication is permissible in addition to
17 communication by mail.

18

19 **77-545. State corporation commission; adjudicative proceedings; ex parte communications; file and**
20 **docket, contents; technical staff, not party to proceedings.** (a) This section applies to adjudicative
21 proceedings before the state corporation commission.

22 (b) (1) After the commission has determined and announced that a hearing should be held, and prior
23 to the issuance of a final order, no parties to the proceeding, or their counsel, shall discuss the merits of
24 the matter or proceeding with the presiding officer unless reasonable notice is given to all parties who
25 have appeared to enable the parties to be present at the conference.

26 (2) After the commission has determined and announced that a hearing should be held, prior to the
27 issuance of a final order, copies of any written communications from any party regarding the proceeding
28 that are directed to the presiding officer shall be ~~mailed to~~ served on all parties of record and proof of
29 service shall be furnished to the commission. Communications requested by members of the
30 commission staff from any party and any written communications received by members of the
31 commission staff from any party shall be made a part of the file and the docket and shall be made
32 available to all persons who desire to use them, provided that all commission requests for information
33 from a party shall be ~~mailed to~~ served on all parties of record.

1 (3) The person or persons to whom any ex parte communication has been made shall promptly and
2 fully inform the full commission of the substance of the communication, and the circumstances thereof,
3 to enable the commission to take appropriate action.

4 (c) For purposes of this section, no member of the technical staff shall be considered a party to any
5 proceeding before the commission, regardless of participation in staff investigations with respect to the
6 proceeding or of participation in the proceeding as a witness. Since the purpose of the staff is to aid the
7 commission in the proper discharge of commission duties, the presiding officers shall be free at all times
8 to confer with any staff member with respect to any proceeding. However, no facts that are outside the
9 record, and that reasonably could be expected to influence the decision in any matter pending before
10 the commission, shall be furnished to any presiding officer unless all parties to the proceeding are
11 likewise informed and afforded a reasonable opportunity to respond. Subsection (b) shall apply to staff
12 counsel in regard to any adjudicatory proceeding before the commission.

13 (d) All letters and written communications that are received by the presiding officer from members of
14 the general public, and that are in the nature of ex parte communications, shall be made a part of the
15 file in the docket and shall be made available to all persons who desire to see them. The deposit of such
16 written communications and letters in the file shall not make them a part of the official record of the
17 case.

18
19 **77-546. Commissioner of insurance; adjudicative proceedings; ex parte communications; file and**
20 **docket, contents; technical staff, not party to proceedings**

21 (a) This section applies to adjudicative proceedings before the commissioner of insurance concerning
22 any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has
23 jurisdiction and adjudicative proceedings held pursuant to the Kansas insurance holding companies act.

24 (b)(1) After the commissioner has determined and announced that a hearing should be held, and prior
25 to the issuance of a final order, no parties to the proceeding, or their counsel, shall discuss the merits of
26 the matter or proceeding with the presiding officer unless reasonable notice is given to all parties who
27 have appeared to enable the parties to be present at the conference.

28 (2) After the commissioner has determined and announced that a hearing should be held, prior to the
29 issuance of a final order, copies of any written communications from any party regarding the proceeding
30 that are directed to the presiding officer shall be ~~mailed to~~ served on all parties of record and proof of
31 service shall be furnished to the commissioner. Communications requested by the commissioner's staff
32 from any party and any written communication received by the commissioner's staff from any party
33 shall be made a part of the file and the docket and shall be made available to all persons who desire to
34 use them, provided that the commissioner's requests for information from a party shall be ~~mailed to~~
35 served on all parties of record.

1 (3) The person or persons to whom any ex parte communication has been made shall promptly and fully
2 inform the commissioner of the substance of the communication, and the circumstances thereof, to
3 enable the commissioner to take appropriate action.

4 (c) For purposes of this section, no member of the commissioner's technical staff shall be considered a
5 party to any proceeding before the commissioner, regardless of participation in staff investigations with
6 respect to the proceeding or of participation in the proceeding as a witness. Since the purpose of the
7 staff is to aid the commissioner in the proper discharge of the commissioner's duties, the presiding
8 officer shall be free at all times to confer with any staff member with respect to any proceeding.
9 However, no facts that are outside the record, and that reasonably could be expected to influence the
10 decision in any matter pending before the commissioner, shall be furnished to any presiding officer
11 unless all parties to the proceeding are likewise informed and afforded a reasonable opportunity to
12 respond. Subsection (b) shall apply to staff counsel who have participated in the proceeding in regard to
13 any adjudicatory proceeding before the commissioner.

14 (d) All letters and written communications that are received by the presiding officer from members of
15 the general public, and that are in the nature of ex parte communications, shall be made a part of the
16 file in the docket and shall be made available to all persons who desire to see them. The deposit of such
17 written communications and letters in the file shall not make them a part of the official record of the
18 case.

19
20 **77-548. Director of taxation; adjudicative proceedings; ex parte communications; file and docket,**
21 **contents; technical staff, not party to proceedings**

22 (a) This section applies to adjudicative proceedings before the director of taxation. Informal conferences
23 held pursuant to K.S.A. 79-3226, and amendments thereto, shall not be deemed to be adjudicative
24 proceedings for the purposes of this act.

25 (b)(1) After the director has determined and announced that a hearing should be held, and prior to the
26 issuance of a final order, no parties to the proceeding, or their counsel, shall discuss the merits of the
27 matter or proceeding with the presiding officer unless reasonable notice is given to all parties who have
28 appeared to enable the parties to be present at the conference.

29 (2) After the director has determined and announced that a hearing should be held, prior to the issuance
30 of a final order, copies of any written communications from any party regarding the proceeding that are
31 directed to the presiding officer shall be ~~mailed to~~ served on all parties of record and proof of service
32 shall be furnished to the director. Communications requested by the director's staff from any party and
33 any written communication received by the director's staff from any party shall be made a part of the
34 file and the docket and shall be made available to all persons who desire to use them, provided that the
35 director's requests for information from a party shall be ~~mailed to~~ served on all parties of record.

1 (3) The person or persons to whom any ex parte communication has been made shall promptly and fully
2 inform the director of the substance of the communication, and the circumstances thereof, to enable
3 the director of any division within the department to take appropriate action.

4 (c) For purposes of this section, no member of the director's technical staff shall be considered a party
5 to any proceeding before the director, regardless of participation in staff investigations with respect to
6 the proceeding or of participation in the proceeding as a witness. Since the purpose of the staff is to aid
7 the director in the proper discharge of the director's duties, the presiding officer shall be free at all times
8 to confer with any staff member with respect to any proceeding. However, no facts that are outside the
9 record, and that reasonably could be expected to influence the decision in any matter pending before
10 the director, shall be furnished to any presiding officer unless all parties to the proceeding are likewise
11 informed and afforded a reasonable opportunity to respond. Subsection (b) shall apply to staff counsel
12 who have participated in the proceeding in regard to any adjudicatory proceeding before the director.

13 (d) All letters and written communications that are received by the presiding officer from members of
14 the general public, and that are in the nature of ex parte communications, shall be made a part of the
15 file in the docket and shall be made available to all persons who desire to see them. The deposit of such
16 written communications and letters in the file shall not make them a part of the official record of the
17 case.

18

19

2 **77-613. Time for filing petition; service of order, pleading or other matter.**

3 Subject to other requirements of this act or of another statute:

4 (a) A petition for judicial review of a rule and regulation may be filed at any time, except as otherwise
5 provided by law.

6 (b) If reconsideration has not been requested and is not a prerequisite for seeking judicial review, a
7 petition for judicial review of a final order shall be filed within 30 days after service of the order.

8 (c) Except as provided in K.S.A. 77-631, if reconsideration has been requested or is a prerequisite for
9 seeking judicial review, a petition for judicial review of a final order shall be filed: (1) Within 30 days
10 after service of the order rendered upon reconsideration, unless a further petition for reconsideration is
11 required under K.S.A. 66-118b, and amendments thereto; (2) within 30 days after service of an order
12 denying the request for reconsideration; or (3) in proceedings before the Kansas corporation
13 commission, within 30 days of the date the request for reconsideration is deemed to have been denied.

14 (d) A petition for judicial review of agency action other than a rule and regulation or final order shall be
15 filed within 30 days after the agency action, but the time is extended:

16 (1) During the pendency of the petitioner's timely attempts to exhaust administrative remedies; and

17 (2) during any period that the petitioner did not know and was under no duty to discover, or did not
18 know and was under a duty to discover but could not reasonably have discovered, that the agency had
19 taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner
20 to obtain judicial review under this act.

21 (e) Service of an order, pleading or other matter shall be made upon the parties to the agency
22 proceeding and their attorneys of record, if any, (1) by delivering a copy of it to them; (2) or by mailing a
23 copy of it to them at their last known addresses; or (3) by sending a copy to them by electronic means
24 when authorized by supreme court rule or a local rule. Delivery of a copy of an order, pleading or other
25 matter means handing it to the person being served or leaving it at that person's principal place of
26 business or residence with a person of suitable age and discretion who works or resides therein. Service
27 shall be presumed if the presiding officer, or a person directed to make service by the presiding officer,
28 makes a written certificate of service. Service by mail is complete upon mailing. Whenever a party has
29 the right or is required to do some act or take some proceedings within a prescribed period after service
30 of an order, pleading or other matter and it is served by mail or electronic means, three days shall be
31 added to the prescribed period. Unless reconsideration is a prerequisite for seeking judicial review, a
32 final order shall state the agency officer to receive service of a petition for judicial review on behalf of
33 the agency.

34 **COMMENT:** The amendments to this section would authorize service by
35 electronic means as a third alternative method of service of an order, pleading or
36 other matter in a proceeding under the Kansas Judicial Review Act, but only if

1 electronic service has been authorized by Supreme Court rule or a local court rule.
2 Currently, Supreme Court Rule 122 states that electronic service of papers under
3 K.S.A. 60-205 is authorized in any district court that has implemented an
4 approved electronic filing system.

5 The amendments to K.S.A. 77-613 are slightly different from the amendments to
6 K.S.A. 77-531. Because a judicial review action under K.S.A. 77-613 involves a
7 court proceeding (whereas K.S.A. 77-531 involves administrative proceedings),
8 the amendments have been drafted to parallel similar provisions in K.S.A. 60-205
9 and 60-206 of the code of civil procedure.

10